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IN THE

Supreme Court of the United States

October Term, 1941.

No. 120.

BEN BIMBERG & CO., INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari.

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Petitioner would like to emphasize that the primary question before this Court is whether the reimbursements received by petitioner from its vendors should be declared taxable income in 1935 or in some other year.

This question was presented to the United States Board of Tax Appeals, which rendered its decision *on the merits* sustaining the Commissioner's treatment of these reimbursements as income for 1936. In upholding the Commissioner the Board simply rejected petitioner's contention that the reimbursements should be declared taxable income in 1935 and that the 1935 return be readjusted (the statutory period not having expired).

The Commissioner, before the Board of Tax Appeals, never even argued that petitioner gave him no notice or adequate opportunity to readjust the 1935 return. He merely insisted that the reimbursements were taxable in-

come in 1936. This position was assumed because the Commissioner knew as a result of petitioner's filing with him of an affidavit dated December 14, 1938 (R., 42-44), and as a result of earlier protests and proposals that petitioner desired a readjustment of its 1935 tax return. The only point of controversy in the 1936 return was the petitioner's repeated assertion that the A. A. A. reimbursements were not taxable in 1936; in all other respects except that, the tax return was mutually acceptable to petitioner and Commissioner.

The three year statutory period in the instant case expired March 15, 1939 since the 1935 return was filed about March 15, 1936 (Section 275 [a] [c] of Revenue Act of 1934—Appendix "A"). On December 15, 1938, the Commissioner received formal notice in writing (protest in affidavit form) of petitioner's position. This was after prior informal notices and opportunities had been given the Commissioner to readjust the 1935 return.

In view of the foregoing, before the Court of Appeals for the Second Circuit the Commissioner was naturally silent on the question of notice, and stated in his brief that the *sole question* presented was:

> "Where the petitioner was properly allowed certain deductions in 1935, was the Commissioner warranted in including as income for 1936, reimbursements received or accrued in that subsequent year?" (p. 2).

The Commissioner, knowing that he had received an adequate opportunity to readjust the 1935 return, argued in his brief that regardless of whether or not the earlier year was closed by the running of the statute of limitations, the reimbursements should be declared taxable income in 1936 (pp. 15, 16-17). He concluded on page 17 of his brief:

> "It thus becomes clear that the only workable rule requires that the refund should be taxed in the later year, regardless of whether the earlier year is still open."

It is apparent that before the Second Circuit Court of Appeals the Commissioner did not assert that the petitioner failed to give him an adequate opportunity to readjust the 1935 return. Instead, he chose to follow the aforesaid approach.

Thus, petitioner was shocked when Circuit Court Judge Learned Hand in deciding the instant case went off on a tangent, and based his decision on a ground not even raised by the Commissioner. Furthermore, there was nothing in the record to justify the *Court's assumption* that no opportunity was given the Commissioner to reassess the 1935 return. In fact, the Commissioner, since he had received ample notice, argued the sole point in his brief that the refund should be taxed in the later year regardless of whether the earlier year was still open (pp. 15, 16-17).

And even now before the United States Supreme Court the Commissioner (in his brief in opposition to this petition for certiorari) states that the question presented " * * * is whether the Commissioner erred in treating the reimbursements as income for 1936" (p. 2)—again maintaining a discreet silence on the question of notice.

Petitioner, being aggrieved, respectfully requests this Court to grant the petition for certiorari for the reasons stated therein and in its brief in support thereof.

Too, the Government has petitioned for certiorari in *Helvering* v. *Estate of David Davies*, No. 118, 1942 Supreme Court Term, reported at 126 F. (2d) 294, 1942 P-H par. 62, 533 (C. C. A. 6, March 5, 1942), and it is also respectfully urged that the granting of the petition in that case requires similar action here.

In the *Davies* case, the Government is seeking to readjust the 1935 return of the taxpayer therein to eliminate the deduction claimed. In the case at bar, the petitioner insists that the same procedure be followed.

In the *Davies* case, $59,049.44 of the total sum deducted was deposited in escrow in 1935 pursuant to a restraining order against the Collector of the taxes. The sum of $65,861.25 was accrued on the books of the taxpayer as a debit to "merchandise purchases, hog tax or pork" and as a credit to accounts payable. In the instant case, the petitioner's books, also kept on the accrual basis, did show the full amount of taxes in question, $19,763.13 as a deduction from gross income. In determining its taxable income for the year 1935, petitioner considered the sum of $19,763.13 as part of the cost of goods sold (R., 24, Pet. 3).

In both cases, according to the weight of authority, (Pet. 7) the Government should readjust the 1935 return (the statutory period not having expired) to eliminate the deduction claimed and thereby truly reflect the taxpayer's 1935 income.

Counsel would also like to point out that the Court of Appeals for the Eighth Circuit in *Cannon Valley Milling Co.* v. *Commissioner,* (Alex. Federal Tax Service, par. 20,872) has affirmed the decision of the United States Board of Tax Appeals, 44 B. T. A. 763 (1941) relied upon by petitioner at page nine of both his petition and brief in support thereof.

The Eighth Circuit Court of Appeals holds that processing taxes collected by a corporation in 1935 and returned to its customers in 1937, after the A. A. A. was declared unconstitutional in 1936, is deductible in 1935, the year in which the sales occurred, and not in 1937 (the year of refund) as alleged by the Government.

It should logically follow, in addition to it being proper accounting practice, that if the vendor is entitled to a

deduction in 1935, petitioner, as vendee, must be deemed to have received taxable income in that very same year (see petition, p. 9, and main brief, p. 10).

In this connection counsel calls the Court's attention to *Greer-Robbins Co.* v. *Commissioner,* 119 F. (2d) 92, 1941 P-H par. 62,605 (C. C. A. 9, 1941) and the connected case of *Commissioner* v. *Union Motors, Inc.,* 119 F. (2d) 93, 1941 P-H par. 62,606 (C. C. A. 9, 1941), where the Court of Appeals for the Ninth Circuit held that where accrued interest owed an affiliate company is deductible in 1935 the affiliate company must be deemed to have received taxable income in the same year.

It is respectfully submitted that the same principle should be applied to the case at bar and the petitioner should be held to have received taxable income in 1935 with respect to the A. A. A. reimbursements received.

CONCLUSION.

The Petition Should Be Granted.

Respectfully submitted,

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